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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HAVENS REALTY CORPORATION and ROSE JONES,

Petitioners,

vs.

SYLVIA COLEMAN, R. KENT WILLIS and HOUSING OPPORTUNITIES MADE EQUAL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS

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* All parties of record in this case have consented pursuant to Supreme Court Rule 36.2 to the filing of this *amicus* brief in support of petitioners. A record of these consents has been filed with this Court.

INTEREST OF THE NATIONAL ASSOCIATION OF REALTORS®

The decision of the court of appeals is of direct and immediate concern to the National Association of Realtors® (NAR) and its members for the following reasons:

First, it inherently presents for decision the issue of whether or not this Court interprets the Fair Housing Act of 1968 as requiring the distribution of housing in such a way as to produce an integrated housing arrangement.

Second, it expressly presents for decision the issue of whether or not real estate brokers and their salespersons can be sued for alleged violations of the Fair Housing Act by self-selected "civil rights" vigilantes and their employers who are neither bona fide clients or customers of such brokers nor residents of the neighborhoods served by them.

Third, it promises to determine whether or not the purchase, sale or transfer of real estate in this country, both with and without the aid of real estate brokers, will be conducted in an environment of fear, suspicion and exploitation.

I. The Identity Of NAR

The interest of NAR in the decision in this cause can be better understood if the purpose and nature of NAR is appreciated.

Founded in 1908, NAR is headquartered in Chicago, Illinois. It is a non-profit professional association of per-

sons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling.

NAR is the owner of various registered service and collective membership marks, including the mark "REALTOR®". Over the years NAR has promoted a public understanding of the term "REALTOR®" as identifying a member of the NAR engaged in the real estate business on a professional basis and subscribing to and bound by a strict Code of Ethics.

NAR has been successful in promoting this understanding and, as a consequence, it is the beneficiary of substantial and significant "good will" which is embodied in its membership marks.

Because of the value of the term "REALTOR®" and also because of the many and varied services available from NAR, real estate boards have sought affiliation with NAR as Member Boards of REALTORS®. Such affiliation is accomplished by the issuance of a charter by NAR affording membership privileges and granting the Board the right to use the term "REALTOR® in the exchange for the Board's agreement to provide service to their members and the public, to enforce the Code of Ethics, and to assist in safeguarding the registered marks of NAR.

Today, the membership of NAR includes 50 State Associations of REALTORS®, over 1,700 Member Boards of REALTORS®, and more than 600,000 REALTOR® and REALTOR-ASSOCIATE® members.

NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. In pursuit of these objectives, NAR

is concerned with a wide range of activities, including real estate education, home protection, arbitration of member and public controversies, equal opportunity in housing, real estate licensing, public service, neighborhood revitalization, and legislation relating to the real estate business.

II. The Total Commitment Of NAR To Fair And Equal Housing Opportunity

The Code of Ethics of NAR to which all members are required to subscribe, provides, in Article 10:

> The REALTOR® shall not deny equal professional services to any person for reasons of race, creed, sex, or country of national origin. The REALTOR® shall not be party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex, or country of national origin.

This article was adopted by NAR in support of the letter and spirit of the federal Fair Housing Act of 1968 as well as the Civil Rights Act of 1866 as applied by this Court in *Jones v. Mayer Co.*, 392 U.S. 409 (1968).

In further recognition of its legal and moral obligation to fair and equal housing opportunity, NAR established a Code for Equal Opportunity that has been adopted and implemented by every one of its Member Boards.

Through cooperation with the United States Department of Justice and by agreement with the United States Department of Housing and Urban Development (HUD), NAR has developed the first nationwide Affirmative Marketing Agreement in the real estate industry.

The NAR-HUD Affirmative Marketing Agreement, the nation's most successful voluntary compliance pro-

gram in housing, is premised on the understanding that Congress did not intend that the Fair Housing Act should ever be construed so as to limit, restrict or inhibit the right of persons to freely select and determine where they will make their home. Rather, it is the understanding of NAR that Congress intended by the Fair Housing Act to enhance, promote and protect the unfettered right of every American to select the home he can afford in the neighborhood and community of his choice without regard to race, color, sex or national origin.

Over 250,000 of NAR's members have committed themselves to the Affirmative Marketing Agreement and thousands more are being processed each month as fast as HUD is able to incorporate them into the Agreement's Action Program.

Further, and consistent with its total commitment to fair and equal housing opportunity, NAR has initiated a nationwide neighborhood revitalization program to limit urban blight and has coupled this program with a broad range of activities to generate or encourage new sources of home financing for low and moderate income families.

No other trade association in the country has committed more of its time and human and material resources to the recognized goals of the federal fair housing laws than has NAR.

III. Purpose Of This Brief Amicus Curiae

The purpose of NAR in submitting this brief is to present the views of the chief representative of the organized real estate profession as to the effects of the court of appeals' decision if allowed by this Court to stand.

This brief is particularly appropriate in view of the fact that nowhere in the decision of the court of appeals does it appear that the slightest attention was given to the impact or effects of the decision on the real estate brokerage business and those engaged in it or on the voluntary compliance programs of NAR and others.

In its laudable desire to discourage discrimination in housing, the court below has created an instrument of legal harassment and oppression unprecedented in American jurisprudence. In its legitimate concern for the interests of the homeseeker, the court of appeals has countenanced a concept of standing that cannot help but incite litigation, coerce unwarranted settlements, and discourage legitimate business activity.

In considering the Argument presented hereafter, we urge this Court to note particularly the significance of the fact that each of the individual plaintiffs who seek standing herein acted as "testers" in this cause and of the nature of the "testing experience."

The testing experience is premised on pretense. The tester's identity as a homebuyer is fictitious, his housing needs are unreal, and his responses are wholly contrived.

Moreover, the testing experience involves an inherent bias. Testers are usually unpaid and hence are motivated to act as testers by a "special interest" in civil rights problems and a conviction that the targets of the testing are the cause of such problems. Testers, unlike investigators for law enforcement agencies, have no obligation of fairness or balance. On the contrary, testers are free to construe even innocent conduct as evidence of guilt.*

* The inherent bias of testers moved one federal judge to make the following comment on the credibility of tester testimony:

(Footnote continued on following page)

The testing experience is imprecise. Testers often compare the conduct of different salespersons in the same organization, and even where the conduct of the same individual is compared, it is rarely accomplished in comparable circumstances within a reasonably controlled situation. Thus, the perceived "differences" deemed to evidence unequal treatment are often attributable to factors and influences having nothing whatsoever to do with race, creed, sex, or national origin. Because of these infirmities, the product of the testing experience is extremely unreliable. Where, as is the usual case, the only use made of the testing experience is to alert law enforcement agencies to suspected discrimination, the dangers posed by this unreliability can be mitigated by the independent investigation and verification procedures employed by such officials and responsible agencies.

Where, as here, the testing experience becomes the vehicle for the generation of a lawsuit, its unreliability and inherent susceptibility to use (or abuse) as a means of gaining publicity, and coercing unwarranted settlements to avoid the costs of defense, must be considered

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* *continued*

> . . . in this case, the testers were not disinterested witnesses. They instigated this suit; they tested Dwayne Realty in order to advance economic and non-economic interests of theirs they thought were at stake; and they were candid in admitting to having strong feelings against real estate brokers in general, and these defendants in particular, because of developing social conditions in their village which they attributed to them.
>
> . . . When a person has an interest in the outcome of a case; when he harbors strong feelings against a party, the tendency is for him to shape his sensory reactions so that they fit the testimony he wants to give.

Village of Bellwood, et al. v. Dwayne Realty, et al., 482 F.Supp. 1321, 1331 (N.D. Ill. 1979) (Leighton, J.).

in evaluating whether the interests of the tester turned plaintiff represent the type of "personal stake in the outcome of the controversy" that justifies standing. *Flast v. Cohen*, 392 U.S. 83, 99 (1967).

As the ensuing Argument will demonstrate, the metamorphosis of "testers" into plaintiffs does not make reality out of pretense, or produce "injury in fact" from a real estate transaction that "never was".

SUMMARY OF ARGUMENT

The outcome of this case turns on whether this Court intended its decisions in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) and *Gladstone, Realtors® v. Village of Bellwood*, 441 U.S. 91 (1979) to grant standing to sue under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* to any person prepared to allege a violation of the Act.

This is the effect of the construction placed upon these decisions by the court below. By adopting this construction, the court below found that the individual plaintiffs had standing even though

(a) they were *not* bona fide renters, nor authorized law enforcement agents or investigators, but rather self-appointed testers; and

(b) they failed to allege any facts that would permit a reasonable person to conclude that defendants' conduct denied them a "right to live in an integrated society."

The organizational plaintiff, Housing Opportunities Made Equal (HOME), was also found to have standing even though its "interest" in the litigation was nothing more than a general commitment to the social objective of integrated housing.

The decision of the court below effectively constitutes every citizen a "private attorney general" under the Fair Housing Act and authorizes them to sue any person, firm, corporation or organization whom they believe to be engaged in conduct that denies them "a right to live in an integrated society." The court below would permit these lawsuits to be brought even though there are no guidelines, judicial or otherwise, defining what is meant by "society" or "integrated".

We do not believe that this Court intended its *Trafficante* and *Bellwood* decisions to be so construed. Such a construction is contrary to the Fair Housing Act's stated objectives of equal housing opportunity for all citizens without regard to race, creed, sex, or national origin, and is inconsistent with established Article III principles governing standing to sue in the federal courts.

ARGUMENT

I. Testers Do Not Have Standing Under Article III Of The Constitution

The court below undertook to provide an answer (App. 68-71) to the question this Court expressly declined to answer in *Gladstone, Realtors® v. Village of Bellwood*, 441 U.S. 91, 111 (1979); namely, whether testers *as testers* have standing to sue under the Fair Housing Act and Article III of the Constitution.

We submit the answer of the court below is wrong.

During the nearly two hundred years this Court has been construing Article III of the Constitution, it has never once deviated from, or diluted, the principle of standing that

> a plaintiff . . . must allege specific concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention.

Warth v. Seldin, 422 U.S. 490, 508 (1975). *Accord, Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 260-61 (1977); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973).

Yet, ignoring this Article III axiom, the court below found that "tester plaintiffs" Willis and Coleman had standing merely and solely because the court could find "no rational reason why . . . bona fide surrogates [of persons actually denied housing on the basis of race] cannot pursue their cause." (App. 71). Declining to for-

mulate *any* rule circumscribing tester standing, the court below concluded that tester standing is permissible in those "areas fundamentally necessary for access to the federal courts . . . or . . . where Congress had recognized a similar deeply-grounded human right." (*Id.*).

Simply put, the court below has, by judicial fiat, amended the Constitution to exempt from Article III those cases brought under the Fair Housing Act by "surrogates" of those actually injured by racial discrimination. This holding is utterly devoid of even a scintilla of precedential support.

Chief Justice Warren summarized completely and succinctly the well established limitations on standing mandated by Article III of the Constitution in these words:

> The judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by this case-and-controversy doctrine.

Flast v. Cohen, 392 U.S. 83, 94-95 (1968). Chief Justice Warren further defined the inquiry necessary to determine whether Article III's mandate of "adversness" is met: ". . . it is both appropriate and necessary to . . . determine whether there is a logical nexus between the [plaintiff's] status . . . and the claim sought to be adjudicated." *Id.* at 102.

The manifest and accepted purpose of this inquiry is, of course, to determine whether a plaintiff "[has] suffered a particular injury caused by the action challenged as unlawful." *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 220-221 (1974). Unless "injury in fact" is demonstrated, a court is without power to redress that grievance, and its intervention would be, at best, gratuitous. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

This was the holding in *Warth v. Seldin*, 422 U.S. 490 (1975) where residents of Rochester, New York claimed that "exclusionary zoning" by the neighboring community of Penfield unlawfully interfered with their choice of housing and increased their local tax burdens. This Court held that the plaintiffs did not meet Article III's standing requirements because they failed to allege specific facts to show that elimination of Penfield's exclusionary zoning would redress their claimed injuries.

To be sure, a constitutionally cognizable injury need not be economic, *United States v. SCRAP*, 412 U.S. 669 (1973), nor suffered by a limited number of persons, *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). But Article III still requires that there be some rational relationship or nexus between an injury to the plaintiff and the defendant's allegedly wrongful conduct.

The court of appeals cites two cases to justify its holding that tester status alone, and without more,

meets Article III requirements for standing: *Pierson v. Ray*, 386 U.S. 547 (1967) and *Evers v. Dwyer*, 358 U.S. 202 (1958). Neither of these cases, however, support that holding. Both of these cases dealt with black plaintiffs who violated a municipal ordinance requiring racial segregation. The record showed that the plaintiffs in each case violated the ordinance for the express purpose of "testing" the ordinance's constitutionality.

This Court held that the plaintiff's motive for violating the ordinance did not defeat their claim of standing since they had in fact been denied equal access to public facilities on the basis of their race. But this Court did not hold in the *Pierson* and *Evers* cases, and has not held in any other decision, as did the court below, that plaintiffs who had not suffered injury can obtain standing simply because they are "motivated" to test compliance with the law. The lesson of the *Pierson* and *Evers* cases is that "motive" is irrelevant to standing under Article III, neither defeating nor creating it.

By eliminating the constitutionally required nexus between a defendant's conduct and injury to the plaintiff, the court below has more than cut the Fair Housing Act loose from the moorings of Article III. It has committed federal courts to decide "made up cases" involving "hypothetical injury" based on "experimental" situations.

The sole justification of the court below for its willingness to waive injury as a prerequisite to Article III standing is that

> individuals illegally denied housing by subterfuge are, by the nature of the wrongful act, less able than others in our society to require enforcement of the Civil Rights Act through private litigation as private attorneys general. (App. 71).

The fundamental fallacy of this proposition is disproved by the very facts of this case. This lawsuit was filed on behalf of four plaintiffs, only one of whom, Paul Allen Coles, actually sought rental housing from the defendants and allegedly was denied housing of his choice. Defendants did not challenge Coles' standing, and as to him the case went to trial and a judgment was rendered on his behalf. (App. 8). Thus the only individual, Mr. Coles, who was found to have been "illegally denied housing by subterfuge" was not only able, but successful in requiring "enforcement of the Civil Rights Act." Nowhere does the court below give any reason or cite any evidentiary support for its conclusion that victims of housing discrimination are "less able" than others to defend their rights. The conclusion seems rather to be premised solely on a stereotype image of the minority person as ignorant, poor, uneducated, or without governmental and private resources or recourse. We submit this stereotype is not only contrary to fact but is itself a source of discrimination.

This Court has already held that standing under the Fair Housing Act is as broad as permitted by Article III. *Gladstone, Realtors® v. Village of Bellwood*, 441 U.S. 91, 109 (1979). If the statutory provisions of the Fair Housing Act are inadequate to deal with housing discrimination, then the solution lies with Congress. However commendable the goals of the Fair Housing Act may be, the Constitution does not permit federal courts to pursue those goals by ignoring the mandate of Article III.

II. The Individual Plaintiffs Have Not Alleged A Nexus Between Defendants' Conduct And A Denial Of Plaintiffs' Right To Live In An Integrated Society

The lower court held that the individual plaintiffs, Willis and Coleman, had standing, not only in their capacity as testers, but also because they had sufficiently alleged that defendants' conduct had deprived them of their right to live in an integrated society. (App. 71-75). The lower court reached this conclusion even though the most precise definition in plaintiffs' Complaint of the "society" in which they live is "the City of Richmond or Henrico County" Virginia (App. 13), a region containing over 2,000 square miles and over 400,000 people.

Admittedly, this Court held in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) and *Gladstone, Realtors® v. Village of Bellwood*, 441 U.S. 91 (1979) that deprivation of a right to live in an integrated society is a cognizable injury sufficient to confer standing under the Fair Housing Act. But the manner in which the court below construed *Trafficante* and *Bellwood* demonstrates that the concept of a "right to live in an integrated society" is inherently unworkable in the context of the Fair Housing Act.

It is perhaps feasible to extend Fair Housing Act standing to residents of an apartment complex as in *Trafficante*, or a relatively small and precisely defined neighborhood as in *Bellwood*. In both cases, the number of persons to whom standing would extend is at least ascertainable. Likewise, the injury claimed by the plaintiffs would arguably be redressed by an order prohibiting the defendants from engaging in the racial steering of which they were accused.

But the concept of a right to live in an integrated society is, as the opinion of the court below illustrates,

impossible to limit as a matter of law. For all practical purposes, the concept is nothing more than an intellectual construct that permits suits to be brought under the Fair Housing Act without regard to Article III. The opinion of the court below illustrates why this is true.

The court below held that a plaintiff must be given an opportunity to prove at trial that the racial character of the society in which he lives is affected by the defendants' allegedly wrongful conduct. Thus, the court below permitted the plaintiffs the sole right to secure a trial on the merits using any definition of an affected "society" they choose to allege in their Complaint. In this case the court permitted plaintiffs to allege that the affected "society" could encompass all of metropolitan Richmond. If the holding of the court below is correct, the plaintiffs could as easily have alleged a "society" represented by the State of Virginia, or for that matter, by all fifty states. If the affected "society" can be whatever plaintiffs allege it to be, then the nexus between a plaintiff's claimed injury and the alleged conduct of the defendant required to establish standing is so tenuous that standing to sue for a single act of discrimination could be extended to every citizen in every jurisdiction in which the Fair Housing Act applies. Standing that extends this far trivializes Article III to the point of making it irrelevant.

The absurdity of the lower court's holding is illustrated most starkly by the potential liability it portends for a real estate broker. If a real estate broker can, as the lower court suggests, deny all residents of the Richmond Metropolitan Area of their right to live in an integrated society by engaging in one or more acts of discrimination at one apartment complex, then that broker is presumably liable to each and every citizen of

the Richmond Metropolitan Area for the monetary damages attributable to that injury. Here, the plaintiffs claim each "tester plaintiff" suffered $1,000 in actual damages. If plaintiffs' damage claims are accurate, and the population of the Richmond Metropolitan Area is 400,000, the defendants' potential liability to the tester plaintiffs, and all others similarly situated, is $400,000,000 in actual damages alone.

Simply put, the concept of a "right to live in an integrated society" presupposes the ability of a court to answer certain questions, which we submit are inherently incapable of resolution through the judicial process.

First, a court must define the "society" in which the plaintiff lives. The answer to this question will presumably depend upon the areas within which the plaintiff routinely comes in contact with other people. For some plaintiffs, this could be a single neighborhood. For others who maintain multiple residences, it could be more than one neighborhood in more than one state. For still others, it could be as large as an entire community, or perhaps as small as a single square block.

Second, a court must define what is meant by an "integrated" society. Does "integrated" mean a community has at least one minority resident or does it mean a substantial portion of the community's population is composed of racial minorities? If so, how much is "substantial"? Or, is "integration" to be measured by reference to the racial composition of some other larger community? Also, is "integration" simply a head count or ratio of minority to non-minority residents or, must a society's minority population be evenly dispersed throughout each community?

Third, a court must decide how many "societies" are affected by a single act of racial steering. Is the

"affected society" the community to which the buyer was steered? Or, is it the other communities in which the buyer might have located had he not been steered? An even more intriguing issue is whether the answers to these questions depend upon the race of the person steered and the racial composition of the communities that he is steered to or from.

Efforts to answer these questions will force courts ultimately to confront the issue that is at the root of *Trafficante*, *Bellwood*, and this case: Is the purpose of the Fair Housing Act to guarantee "freedom to choose" housing regardless of race, or is the purpose of the Act to create a court-mandated, defined and supervised "integrated society" using so-called "benign" or "affirmative" racial steering, if necessary, to achieve this result?

The implications presently being drawn from this Court's decisions in *Trafficante* and *Bellwood* are that the purpose of the Fair Housing Act *is* the creation of an integrated society, rather than a guarantee of freedom to choose housing without regard to race. If the purpose of the Act were the latter, this Court could not have recognized a "right to live in an integrated society" since there is no guarantee that individual housing choices, freely made, will result in an integrated society. On the other hand, a "right to live in an integrated society" must necessarily contemplate so-called "benign" or "affirmative" steering, since an integrated society cannot truly be achieved without some race-conscious limitations imposed on individual housing choices.

The possibility that racial steering can be classified as "good" and "bad"—the latter prohibited by the Fair Housing Act and the former mandated by it—subjects sellers of real estate and their agents to intolerable risks

that can only operate to "chill" the right to transfer and sell real estate. It is manifestly impossible for real estate sellers and brokers to assess the demographic consequences of their acceptance or rejection of prospective buyers in terms of whether the "integration" of society is advanced, preserved, or retarded. As a result, every sale, every offering for sale, and, where testers are concerned, every inquiry concerning the availability of a property for sale, represents a potential class action lawsuit brought by persons who are total strangers to the entire transaction.

What all this means, is that this Court must, at some point, reassess whether a "right to live in an integrated society" can ever be a cognizable injury subject to redress through the Fair Housing Act. Or else this Court must be prepared to recognize, as did the court below, that actions brought under the Fair Housing Act are simply not subject to the constitutional limitations of Article III.

III. The Organizational Plaintiff Lacks Standing Under Article III Of The Constitution

The plaintiffs in this lawsuit include a local housing organization, Housing Opportunities Made Equal (HOME), a Virginia non-profit corporation with a multiracial membership of approximately 600 individuals. (App. 13).

On two alternative theories, the court below held that HOME had standing to sue the defendants for racial steering. (App. 75-77). The court held first that HOME had met the representational standing test announced by this Court in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977), and therefore had standing to represent the individual claims of its mem-

bers. (App. 75-76). The court then held that HOME also had standing to sue for injury to itself as an entity separate and distinct from its membership. (App. 76-77).

Holding that HOME had standing to represent the interests of its members, the court below quoted the following language from this Court's *Hunt* opinion in which the representational standing test is defined:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members.

(App. 75). Without any analysis whatsoever, the court below simply declared that HOME met this test because it alleged that its members "have been deprived of community advantages in the same language utilized by Coleman and Willis." (*Id.*).

Manifestly, if this Court finds, as urged heretofore, that Coleman and Willis do not have standing, then, by the same logic that the court below conferred standing on HOME, this Court should deny such standing. As this Court held, the first prerequisite of representational standing is that an organization's members "would otherwise have standing to sue in their own right." *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

HOME's failure to meet this first prerequisite defeats its representational standing in this case. According to the court below, HOME's members have standing because HOME claims that its members have been de-

prived of the same rights as Willis and Coleman. But the Complaint is even less specific concerning the neighborhood in which any HOME member resides. (App. 13). Indeed, the Complaint is devoid of any allegations revealing the residence or characteristics of a single HOME member.

The court below also found that HOME alleged sufficient injury to confer standing on it directly. (App. 76). As the Complaint in this case states, HOME is a not-for-profit corporation formed for the purpose of engaging in activities designed to further the organization's stated goal of promoting equal housing opportunity.* HOME presumably derives funds to support its activities in whole or in part from membership dues or donations contributed by individuals who share HOME's commitment to its stated goals and objectives. Thus, HOME's organizational structure is no different from thousands of other not-for-profit or charitable organizations, such as the Sierra Club, the Urban League, or the American Red Cross, who engage in activities, funded in part by private donations, designed to advance an objective generally deemed beneficial to society as a whole.

As commendable as the stated objectives of these organizations may be, this Court has held that an

* While HOME professes to support "equal housing opportunity" (App. 13), the relief sought in its Complaint reveals that its purpose is in fact creating or maintaining integrated housing patterns in Richmond. As part of its relief in this case, HOME is asking the district court to order the defendants to "[solicit and encourage blacks] to rent units in predominately white communities and whites to rent such units in predominately black and integrated communities." (App. 19). Thus, HOME seeks to force upon the citizens of Richmond its view of the "ideal" racial composition of a neighborhood through the same tool—racial steering—that forms the gravamen of its Complaint against the defendants.

organization's dedication to a public purpose does not confer standing on it to challenge third party activities that the organization believes are inimical to its goals. This is the holding of *Sierra Club v. Morton*, 405 U.S. 727 (1972) where this Court held that the Sierra Club did not have standing to sue the federal government and private developers to halt construction of a ski resort in the Sequoia National Forest. In its complaint, the Sierra Club claimed that it is a membership organization whose "activities and conduct exhibited a special interest" in maintaining game refuges and forests throughout the country. *Id.* at 735 n.8.

While this Court recognized that "aesthetic and environmental well being, like economic well being," were cognizable interests ". . . deserving of legal protection through the judicial process," *Id.* at 734, it denied standing to the Sierra Club because it failed to demonstrate the existence of "injury in fact."

This Court noted that ". . . 'the injury in fact test' requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured . . ." *Id.* at 735. This Court found that a "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' . . ." so as to warrant standing to sue. *Id.* at 739.

Had this Court not decided *Sierra Club* the way it did, any group of persons, or even a single individual, could declare themselves dedicated to the enforcement of a particular law, and then initiate litigation against any person they thought was breaking that law, claiming as their injury the resources they expended in pur-

suit of their objective. This is precisely the concern this Court expressed in *Sierra Club* when it said:

> . . . if a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization, however small or short lived. And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so. *Id.* at 739-740.

This Court's *Sierra Club* opinion merely reflects the concept of federalism woven into the fabric of the Constitution. The "interests" pursued by organizations like HOME and the Sierra Club in fact represent questions of public policy rather than the private interests of individual citizens. Federalism dictates that public policy is defined through laws adopted by Congress. Once defined into law, public policy is enforced on behalf of the public at large by governmental prosecutors who are ultimately accountable through the electoral process. If the lower court's opinion is permitted to stand, enforcement of the public policy reflected by the Fair Housing Act would be delegated to self-appointed, unelected and wholly unaccountable interest groups whose personal interpretations of that Act may or may not conform with those of the courts, or with the intent of Congress.

CONCLUSION

The Fair Housing Act aims to provide, within constitutional limitations, for fair housing throughout the United States. 42 U.S.C. § 3601. It does not propose to

establish an integrated society or to guarantee any person's right to live in such society. The Act prohibits practices and conduct that deny equal housing opportunity and choice, but nowhere does the Act seek to control how the freedom of housing choice it guarantees will be exercised.

The Act does not mandate quotas but choice; it does not require the assimilation of different groups into one homogenous whole but rather requires the incorporation of individuals of different groups into society as equals.

Standing to sue under the Fair Housing Act should be determined not in terms of a claim of right Congress has not created and the Constitution has not guaranteed. Nor should it be determined on the basis of a case or controversy arising from a theoretical transaction.

For these reasons, NAR respectfully submits that this Honorable Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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